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In the Supreme Court of the United States

OCTOBER TERM, 1998

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL., PETITIONERS

v.

PAUL FELZEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a shareholder who is not a named plaintiff but who submits an objection to a proposed settlement in a derivative action in district court, in response to notice provided under Federal Rule of Civil Procedure 23.1, may appeal the approval of the settlement without formally intervening as a party.

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INTEREST OF THE AMICI

This case presents an issue of importance to the management and disposition of shareholder derivative actions, which may involve claims under the federal securities laws and issues of corporate governance of critical importance to shareholders. The Securities and Exchange Commission (SEC) has long taken the view that private actions under the federal securities laws serve important functions, in compensating investors who have been harmed by securities law violations and providing "'a most effective weapon in the enforcement' of the securities laws, and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964)); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

The SEC also has an interest in protecting investors through effective corporate governance. The federal government more generally has a substantial interest in the procedural rules that apply in class action suits in a variety of contexts.

STATEMENT

1. On October 15, 1996, Archer Daniels Midland Corporation (ADM) pleaded guilty to federal criminal antitrust violations involving charges that company officers had conspired to fix the price of citric acid. The company paid a $100 million fine and subsequently settled civil antitrust lawsuits filed by competitors for $90 million. Pet. 4.

In the wake of the criminal investigation, ADM shareholders filed several derivative actions on behalf of ADM against directors of the corporation. Those actions were consolidated in United States District Court for the Central District of Illinois. The suits alleged that the directors had breached their fiduciary duties by failing to supervise company employees properly and sought recovery of the $190 million paid out in the criminal and private cases. Pet. 4-5.

On May 29, 1997, the parties in the consolidated cases announced a proposed settlement pursuant to which the shareholders would release the defendants from all claims in exchange for a settlement fund of $8 million (Felzen Br. in Opp. App. 2) and the adoption of corporate governance reforms (ADM Br. in Opp. App. 13a-15a) designed to prevent similar violations in the future. Of the $8 million amount, $3.92 million, plus interest, was to be paid to plaintiffs' counsel (Pet. App. 17a), with the remaining amount designated for legal fees incurred by ADM in adopting agreed-upon reforms (Pet. 6). Neither the corporation nor its shareholders would receive any monetary recovery from the settlement.

2. The district court tentatively approved the settlement on May 30, 1997. Pet. 7. Pursuant to Federal Rule of Civil Procedure 23.1, the court ordered that notice be given to all

ADM shareholders to show cause why the settlement should not be approved. The court ordered that all objections were to be filed by July 3, 1997, and scheduled a final hearing on the settlement for July 7, 1997. Pet. 7. Petitioners California Public Employees' Retirement System and the Florida Board State Board of Administrtion—which hold, respectively, 2.8 million and 1.7 million shares of ADM stock—filed written objections with the district court and appeared at the July 7 hearing. ADM Br. in Opp. App. 4a; Pet. 7. They argued that the settlement disproportionately benefited the plaintiffs' lawyers and that the corporate governance reforms agreed to were not materially better than reforms adopted by ADM a year earlier. ADM Br. in Opp. App. 15a. The district court approved the settlement over petitioners' objections. Felzen Br. in Opp. App. 1-7.

3. The court of appeals dismissed petitioners' appeal, reasoning that, since petitioners had not moved to intervene for purposes of taking an appeal, they were not parties to the case. Pet. App. 3a. The court of appeals held that, under this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), only parties may take an appeal. Pet. App. 1a-2a. The court read *Marino* (a class action rather than a derivative suit) to hold "that a person adversely affected by the settlement of a class action may appeal from the consent decree based on that settlement only if he has intervened as a party." *Id.* at 2a. The court also noted that Federal Rule of Appellate Procedure 3(c) specifies that "[a] notice of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." *Ibid.*

The court observed that prior to *Marino* it had "permitted class members and stockholders to appeal, whether or not they had intervened, provided they had informed the district court of their objections to the decision that disadvantaged them." Pet. App. 2a. But it further noted that since *Marino* it had "held that a class member in an action under Fed. R.

Civ. P. 23 who has not become a party may not appeal from an order granting summary judgment to the defendant." *Ibid.* (citing *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997)). The court reasoned that the same rule should apply to shareholders in a derivative suit challenging a settlement, because shareholders "have no more right to speak for the firm or control its litigation decisions than bondholders or banks or landlords, all of whom have contractual interests that may be affected by litigation." Pet. App. 3a. Although the court recognized that Rule 23.1 requires that shareholders be given notice of the settlement, it read the purpose of that requirement to be "so that other investors may contest the faithfulness or honesty of the self-appointed plaintiffs; we do not doubt that this monitoring is often useful and that intervention to facilitate an appeal could be justified." Pet. App. 6a.

SUMMARY OF ARGUMENT

Until the decision below, courts had uniformly held that objecting shareholders in a derivative action had the limited right to appeal the district court's entry of a settlement decree without formally intervening in the suit. That rule finds support in this Court's cases involving certain persons deemed to be "quasi parties," who have been summoned to court or to whom notice of proceedings has been directed, who appear in court to protect particular interests, and whose rights are affected by claim preclusion principles by the court's judgment. See, *e.g.*, *Williams* v. *Morgan*, 111 U.S. 684 (1884); *Blossom* v. *The Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863). That line of cases, coupled with the procedures of and the purposes behind Federal Rule of Civil Procedure 23.1, support the limited right of objecting shareholders to appeal the court's decree overruling their objections and approving the settlement. Rule 23.1 requires directed notice to all shareholders so that any objector to a

settlement may show cause why the settlement should not be approved. The court's entry of a settlement decree has claim preclusive effect, extinguishing the right of the corporation and the shareholders thereafter to bring the same claim.

The decision below erred in its reliance on *Marino* v. *Ortiz*, 484 U.S. 301 (1988), which involved an attempt to appeal in a class action suit by non-parties who were not members of the class. In *Marino*, the appellants were strangers to the litigation and were not precluded by the judgment from subsequently litigating their claims. The court also erred in relying on Federal Rule of Appellate Procedure 3(c), which defines the contents of the notice of appeal and does not specify that the "party or parties" taking the appeal must be limited to the party or parties who were formally named in the district court proceedings.

ARGUMENT

OBJECTING SHAREHOLDERS MAY APPEAL AN ORDER APPROVING A SETTLEMENT IN A DERIVATIVE SUIT

A. The Right Of Objecting Shareholders To Appeal Is Longstanding And Grounded In This Court's Cases Involving Quasi Parties

In overruling one of its prior decisions, the Seventh Circuit departed from a uniform rule in derivative actions that had long been applied in the courts of appeals permitting an objecting shareholder to appeal without formal intervention if the district court overruled the shareholder's objections in entering a settlement decree. See *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1308 n.6 (3d Cir. 1993); *Tryforos* v. *Icarian Development Co.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1091 (1976), overruled by Pet. App. 7a; *Cohen* v. *Young*, 127 F.2d 721 (6th Cir. 1942). That rule had been reported by influential

commentators without any question as to its validity. See, *e.g.*, 7C C. Wright et al., *Federal Practice & Procedure* § 1839, at 182 (2d ed. 1986) ("[a]n objector to the settlement may appeal the court's approval of the compromise"); 3B J. Moore, 5 *Moore's Federal Practice* ¶ 23.1.24[3] (2d ed. 1996) (same). Indeed, one commentator wrote in 1969 that "[i]f the court approves the compromise [between plaintiff-shareholders and defendants], the objector has an absolute right to appeal." W. Haudek, *The Settlement and Dismissal of Shareholders' Actions–Part II: The Settlement*, 23 SW. L.J. 765, 803 (1969). Although the rule was widely accepted, its origins and underlying legal basis appear to have been forgotten.

1. The modern application of the rule that objecting shareholders may appeal an order approving a settlement to which they object stems from the Sixth Circuit's decision in *Cohen* v. *Young*, *supra*. That case, which was decided shortly after promulgation of the Federal Rules of Civil Procedure, involved a shareholder in a derivative action who brought forward evidence in support of his objection to a proposed settlement, along with a motion to intervene as a party. The district court denied the objector's intervention motion and refused to consider the evidence proffered in support of the objection. The objecting shareholder did not appeal the denial of his motion to intervene, but rather appealed from the district court's entry of a final decree approving the settlement. On appeal, the plaintiff shareholder moved to dismiss on "the ground that appellant is not a party to this cause and hence has no standing in this court." 127 F.2d at 724. The court of appeals deemed "not decisive" the fact that the objecting shareholder had been denied the right to intervene. "Appellant appeared in court in answer to the court's notice to show cause why the settlement should not be approved. This being the case, he was 'like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal.'" *Ibid.* In reaching

that conclusion, the court noted that "[t]his ruling was specifically approved in *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 495. Appellant is entitled as of right to prosecute the appeal." *Ibid.* (parallel citations omitted).[1]

The *Cohen* court thus reasoned that because Federal Rule of Civil Procedure 23 created a specific mechanism for directed notice to all shareholders that they could appear in the district court proceedings for the limited purpose of showing cause why the proposed settlement should not be approved, the objecting shareholder became a "party" for that limited purpose. 127 F.2d at 724. The requirement of formal intervention under Rule 24 did not speak to the question raised by the shareholder's objection, which was "whether the compromise recommended did in fact protect the interest of the corporation and of the stockholders." *Id.* at 725. See also J. Moore & E. Levi, *Federal Intervention, Part I: The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 592 (1936) (noting that a stockholder typically cannot intervene in a lawsuit because litigation decisions are controlled by the directors and officers of the corporation).

2. The *Cohen* court appropriately drew from this Court's analogous decision in *Johnson*. In that case, the Court addressed whether a separate shareholder derivative suit could be brought by a minority shareholder on behalf of a company that, in a prior non-derivative suit, had been the subject of an order appointing a temporary receiver. The object of the minority shareholder's subsequent suit was also the appointment of a receiver. In ruling that the minority shareholder and another plaintiff could not bring that suit,

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[1] *Cohen* also cited *Pianta* v. *H.M. Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935), in which the court found "no merit in appellees' contention that the appellant has no standing to appeal because it was not an original party to the suit and has not sought to intervene. The appellant, having appeared in opposition to the order to show cause, is 'like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal.'"

the Court noted that both had been ordered in the prior proceeding to show cause "why the temporary receivership should not be continued." 289 U.S. at 495. They could have objected on a variety of grounds, "and had the receivership been continued without giving effect to these objections they would have been entitled to appeal." *Ibid.* Although the Court cited as support for that conclusion a number of court of appeals decisions, see *ibid.* n.4,[2] it could as easily have relied upon numerous of its own prior decisions that the courts of appeals had cited, which permitted limited appeals in discrete circumstances by certain "quasi parties" to the underlying lawsuit.[3]

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[2] In particular, see *Christian* v. *R. Hoe & Co.*, 63 F.2d 218, 218 (2d Cir. 1933) (upholding appeal of a "class A stockholder who appeared on the return day of the order to show cause why the receivership of the defendant should not be made permanent. He opposed the application unsuccessfully and appeals. He is rightfully here, like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal."); *Mitchell* v. *Lay*, 48 F.2d 79, 84-85 (9th Cir. 1930) ("It is true that the appellant is not a party to the original action, but when he was brought into court by the process of the court at the instigation of the parties to the action or of the receiver he became a party to the ancillary proceedings and entitled to appeal from the judgment rendered against him. The judgment therein rendered was as to him final and appealable as such."); see also *Blake* v. *District Court*, 59 F.2d 78, 79 (9th Cir. 1932) (holding that a person aggrieved by appointment of receiver should file objections in the district court and then appeal an adverse decision rather than petition for an original writ in the court of appeals).

[3] Although the phrase "quasi parties" typically was not utilized by mid-twentieth century courts in the shareholder and receiver contexts, the holdings of the later courts relied on this Court's decisions from the nineteenth and early twentieth centuries establishing rights of appeal for persons termed "quasi parties" in particular actions analogous to shareholder derivative suits. See, *e.g.*, *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 623-624 (2d Cir. 1934) (L. Hand, J.) (citing *Blossom* v. *The Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863); *Williams* v. *Morgan*, 111 U.S. 684 (1884); *Kneeland* v. *American Loan & Trust Co.*, 136 U.S. 89 (1890)); *Christian*, 63 F.2d at 218 (citing *Hinckley* v. *Gilman, Clinton &*

In *Blossom* v. *The Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), for example, the Court addressed the issue, "Is the appellant so far a party to the original suit that he can appeal?" *Id.* at 655. In that case Blossom had made a bid for property in response to a decree foreclosing a mortgage and ordering a sale. The sale was suspended and Blossom sought to have the sale completed and confirmed. After the district court refused his request, he appealed. The railroad moved to dismiss the appeal on the ground that Blossom was not a party to the suit in the district court and therefore not entitled to prosecute an appeal. This Court rejected the railroad's argument and upheld Blossom's appeal. In a passage that would be much quoted and cited in later decisions, the Court explained:

> It is certainly true that [Blossom] cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments

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Springfield R.R., 94 U.S. 467 (1876)). See also *United States* v. *Seigel*, 168 F.2d 143, 145-146 (D.C. Cir. 1948) (distinguishing Supreme Court quasi party cases because appellant had not participated in district court proceedings and thus had no basis for appealing without formally intervening as a party).

> may be rendered on their bonds or recognizances. So in the case of a creditor's bill, or other suit, by which a fund is to be distributed to parties, some of whom are not before the court; these are at liberty to come before the master after the decree, and establish their claims to share in the distribution.

Id. at 655-656.

Blossom was not an anomalous decision. In *Williams* v. *Morgan*, 111 U.S. 684 (1884), the Court held that objectors to trustee charges were "quasi parties" entitled to appeal an adverse decision without formally intervening through the filing of a complaint: "Williams and Thomson had such an interest [in the trustee charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." 111 U.S. at 700. As support for that holding, the Court drew on a line of cases starting with *Blossom* that had upheld the right of quasi parties "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." *Id.* at 699.[4] The Court also

[4] See *Blossom*, 68 U.S. (1 Wall.) at 656 (purchaser of property subject to foreclosure decree permitted to appeal as a quasi party); *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-634 (1864) (holding that "nominal parties" could not evade appellate review of an order decreed in their favor on the ground that they were not formal parties in the district court); *Hinckley*, 94 U.S. at 469 (receiver allowed to appeal from a decree against him to pay a sum of money in the cause to which he was appointed receiver but was not a party); *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1877) (quasi parties interested in order confirming a sale permitted to appeal); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1881) (allowing appeal by trustees from an order awarding costs and expenses to a complainant suing on behalf of a trust fund); *Hovey* v. *McDonald*, 109 U.S. 150, 155-156 (1883) (permitting appeal to be brought against a receiver from an order made in his favor notwithstanding receiver's contention that he was not a "party" to the underlying lawsuit).

relied upon principles of equity that recognized the rights and interests of quasi parties to participate in trial proceedings without formal intervention and to appeal decisions that would bind their subsequent rights.[5] Decades earlier, Justice Story had recognized the rights of class members in representative suits to appear in court "as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeoparded." *West* v. *Randall*, 29 F. Cas. 718, 722-723 (C.C.D.R.I. 1820) (No. 17,424). See also J. Story, *Commentaries on Equity Pleadings* § 409, at 353 (9th ed. 1879) (noting that "other persons in interest" who are not parties may bring a bill of review "as far as their own interests are concerned"). Thus, as the doctrine of quasi parties developed, it included only a narrow range of appellants, but it did include objecting members in a class suit.

During the same era in which the Court was developing the narrow right of quasi parties to appeal in limited circumstances, it was also considering numerous cases involving the "well settled maxim of the law, that 'no person can bring a writ of error to reverse a judgment who is not a party or privy to the record.'" *Bayard* v. *Lombard*, 50 U.S. (9 How.) 529, 551 (1850).[6] Rather than calling into question

[5] See, *e.g.*, F. Calvert, *A Treatise Upon The Law Respecting Parties To Suits In Equity* 55-66 (1847). See also *Minnesota Co.*, 69 U.S. (2 Wall.) at 634 n.† (citing Calvert's treatise); *Blossom*, 68 U.S. (1 Wall.) at 656 n.1 (same).

[6] See, *e.g.*, *Litchfield* v. *Goodnow*, 123 U.S. 549, 551-552 (1887) (holding that administrator of lands distinct from those at issue in underlying suit was "in law a stranger to the proceedings, and in no way bound thereby," and thus was not a party or in privity to afford a right of appeal); *Indiana S. R.R.* v. *Liverpool, London & Globe Ins. Co.*, 109 U.S. 168, 173 (1883) (where leave to join suit as a party is denied, person cannot appeal from final decree); *Ex parte Cockcroft*, 104 U.S. 578, 579 (1881)

the general principle that only a party or a privy to the record may appeal, the doctrine of quasi parties complemented—indeed exemplified—that rule. In more recent years, the Court has invoked the general principle that only parties may appeal without mentioning (and, presumably, without intending to cast doubt on) its quasi party cases. See, *e.g.*, *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam).

3. In the shareholder context, *Cohen* and similar cases suggest that adoption of the Federal Rules of Civil Procedure was not intended to affect adversely the rights of objecting shareholders as quasi parties to appeal approval of a settlement of a derivative action over their objections. As the owners of the corporation for whose benefit the derivative action is brought, shareholders are not strangers to the action.[7] Indeed, the relationship of the shareholder to the court's decision to approve a settlement is characteristic of a quasi party, as that phrase was used in this Court's cases.

When a particular shareholder brings a derivative action on behalf of the corporation, that shareholder becomes the

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(creditor heard in district court as a matter of favor not permitted to appeal where he was not a party and never asked to be one); *Ex parte Cutting*, 94 U.S. 14, 21-22 (1876) (stockholders could not appeal as parties where they had been denied leave to intervene and where the appeal sought a discretionary writ of mandamus); *Stacy* v. *Thrasher*, 47 U.S. (6 How.) 44, 49-50 (1848) (person not in privity can neither be bound by judgment nor appeal from it); *Ford* v. *Douglas*, 46 U.S. (5 How.) 143, 160 (1847) (same).

[7] In taking a contrary view, the court below opined that, since a derivative action is actually an action brought on behalf of the corporation, the decision to compromise the corporation's claim is not the shareholders', who "have no more right to speak for the firm or control its litigation decisions than bondholders or banks or landlords, all of whom have contractual interests that may be affected by litigation." Pet. App. 3a. The court also likened a corporation's shareholders to its "employees, vendors, and lawyers." *Ibid.*

representative of the corporation and all its shareholders in vindicating the rights of the corporation. *Hawes* v. *Oakland*, 104 U.S. 450, 460 (1881). See also *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949). Although the named plaintiff in a derivative action sues on behalf of the corporation, the shareholders necessarily benefit from whatever recovery the corporation may realize on its claims by the resulting enhancement of the value of their property. See 5 *Moore's Federal Practice* § 23.1.02[3][b] (D. Coquillette et al., eds., 3d ed. 1997) ("As an owner of securities in the corporation, the suing shareholder, along with all other shareholders, is harmed by an injury to the corporation.").

That principle is reflected in three provisions in Federal Rule of Civil Procedure 23.1. First, Rule 23.1(1) contains a "contemporaneous ownership" requirement that only a person who was a shareholder when the injury occurred may bring a derivative action. That requirement ensures that only a shareholder who has suffered an injury (by reason of stock ownership at the time the alleged injury occurred) may press the claim,[8] and establishes a necessary pre-condition that the derivative plaintiff's interests are aligned with those of the shareholders generally. See 5 *Moore's Federal Practice*, *supra*, at § 23.1.02[3][b]. Ownership of the corporation's stock, therefore, gives both the objecting shareholder and the plaintiff shareholder a shared interest in the outcome of the case.

Second, Rule 23.1 provides that a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders * * * similarly situated in enforcing the right of the corporation." That provision recognizes that the named plaintiff in a derivative action may only assert the

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[8] See, *e.g.*, *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 531 n.6 (1984); 7C C. Wright et al., 7C *Federal Practice & Procedure: Civil* § 1828 at 60 (2d ed. 1986).

corporation's claim for the sole benefit of the shareholders, the owners of the corporation. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. at 549 (A stockholder sues in a derivative action, "not for himself alone, but as representative of a class comprising all who are similarly situated.").

Most critically, Rule 23.1 provides that a shareholder derivative action "shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." The requirements are complementary. By ensuring that notice is given to all shareholders before a proposed dismissal or compromise settlement is entered by the court, Rule 23.1 sets in motion a process by which all shareholders must either formally participate in the proceedings or be bound by the decree without having given the court the benefit of their views on whether the court should enter the settlement.

The Rule requires fair notice to shareholders so that they may object in court to the proposed settlement. See, *e.g.*, *Maher* v. *Zapata Corp.*, 714 F.2d 436, 451 (5th Cir. 1983). By longstanding practice, objecting shareholders "must be allowed to have meaningful participation at a settlement hearing," including "certain rights to discovery and cross-examination on issues pertaining to the settlement." 5 *Moore's Federal Practice*, *supra*, at § 23.1.10[1][c]. The requirements of notice and an opportunity to object arise from the recognition that individual shareholders have a personal stake in the presentation of the claim on the corporation's behalf, and that settlement of the case will foreclose both the corporation and its shareholders from later pursuing the corporate claim, since entry of a settlement decree will have a preclusive effect on both the corporation and the shareholders with respect to that claim. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996).[9] The settlement hearing constitutes the only opportunity for a corporation's owners to exercise any measure of control over a corporate claim that, by definition, is not directed by the corporation's shareholder-elected managers. Rule 23.1 accordingly prevents a corporation's claim from being compromised without an opportunity for the corporation's owners to participate in the decision. Thus, because their underlying claim is the same as the named plaintiff-shareholders, notice is directed to them to show cause why the settlement should not be approved, under pain of losing their right to object at all yet being bound by the judgment. Once the Rule 23.1 notice is given, the judgment of the court approving the settlement has claim-preclusive effect on the objecting shareholders. In light of the foregoing specific factors, objecting shareholders may properly be regarded as quasi parties to the district court proceedings.

4. Although this Court's decisions recognize the rights of quasi parties to appeal, in only limited circumstances may a person who is not formally a named party to a case be regarded as a quasi party. In our view, in light of the

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[9] Notice also protects against due process concerns. See, *e.g.*, *Jones* v. *Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) (citing *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."); *Maher*, 714 F.2d at 451 (holding that the "essential purpose of the notice [under Rule 23.1], with regard to the shareholders' due process rights, * * * [is to] fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them"). Cf. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 (1985) (holding that to bind an absent plaintiff in class action, State must provide "minimal procedural due process protection" including "notice plus an opportunity to be heard and participate in the litigation"); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (notice to class members under Rule 23 "is designed to fulfill requirements of due process to which the class action procedure is of course subject").

importance of the regularity and certainty provided by the Federal Rules of Civil and Appellate Procedure and the potential for uncertain application of this Court's quasi party cases in other contexts, recognition of quasi party status in situations not covered in the federal rules of procedure should be sparing indeed.[10] Nonetheless, the Court's quasi party precedents do furnish significant support for the right of appeal in the objecting shareholder settlement context, because: Rule 23.1 specifically recognizes the shareholder's personal rights; this Court's cases arising prior to adoption of the Federal Rules of Civil Procedure involved similar types of interests, objections, and proceedings; and, until the decision below, the consistent practice since the adoption of the Federal Rules of Civil Procedure has been that objecting shareholders in a derivative action need not intervene before appealing the district court's decision to overrule their objections to the settlement.

Furthermore, persons recognized as being quasi parties for a particular purpose (here, objecting to a settlement) do not have unlimited rights of participation and appeal without formal intervention. First, under this Court's quasi party cases generally, the subject of the appeal may encompass only that aspect of the ancillary litigation over which the quasi party had a specific and recognized interest and as to which he actually participated in the district court. Thus, in *Kneeland* v. *American Loan & Trust Co.*, 136 U.S. 89, 94 (1890), the Court limited the scope of the "right of appeal * * * to all matters adjudicated after [the quasi party's] bid which affect the terms of that bid, or the burdens which he assumes thereby, and which are not withdrawn from his challenge by the terms of the decree under which he

[10] In a class action, for example, a question may arise whether an objector has standing as a class member to participate in the process. The parties presumably would have an opportunity to test that standing, just as they do when a motion to intervene is filed.

purchases." See also *Sage* v. *Railroad Co.*, 96 U.S. 712, 714 (1877); J. Story, *supra*, at 353. In the Rule 23.1 context, an objecting shareholder would have the right to appeal the district court's judgment only to the extent it overruled the objections and entered the settlement decree as a result. An objecting shareholder wishing to participate more expansively in the litigation would have to intervene formally as a party.

Second, the quasi party must have been the subject of an order or directed notice to appear in the district court proceedings and must have asserted a personal right that was merged into the court's ruling. See, *e.g.*, *Blossom*, 68 U.S. (1 Wall.) at 656. That assertion need not involve a formal intervention motion,[11] but it must be personal to the quasi party and be grounded in a cognizable legal interest.[12] Here, the objecting shareholder has a personal stake in the

[11] It is clear from this Court's cases concerning participation by persons deemed to be quasi parties that the Court often used the term "intervene" in the sense of participation in the district court proceedings, and not formal intervention through the filing of a complaint. See, *e.g.*, *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590, 593 (1894) (describing how quasi party "was not a party to the record, either plaintiff or defendant; was never substituted for either; filed no bill, cross-bill, or answer; but was simply permitted to intervene, with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder"); *Williams* v. *Morgan*, 111 U.S. at 698-699 (describing how quasi parties "incidentally interested in some branch of a cause have been allowed to intervene for the purpose of protecting their interest"); *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881) (describing how, in the "vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, * * * it has been the common practice * * * to make fair and just allowances for expenses and counsel fees to the trustees" and to allow quasi parties to object to such awards).

[12] Thus, for example, a party's attorney sanctioned by a district court is a quasi party entitled to appeal that order without formal intervention, see, *e.g.*, *Collier* v. *Marshall, Dennehey, Warner, Coleman & Goggin*, 977 F.2d 93, 94-95 (3d Cir. 1992), cert. denied, 510 U.S. 977 (1993).

outcome of a derivative action settlement, is notified to show cause why the settlement should not be approved, and is entitled by law to object to settlement. He therefore may appeal without intervening. By contrast, a citizen who objects to entry of a government-sponsored settlement decree may not.[13] And a quasi party may not appeal an order

[13] See, *e.g.*, Antitrust Penalties and Procedure Act, 15 U.S.C. 16(b)-(h) (Tunney Act). Tunney Act proceedings afford an opportunity to the public to comment on settlements, and differ significantly from shareholder derivative suits. First, derivative suits are prosecuted on behalf of the corporation by a shareholder who otherwise stands on equal footing with all other shareholders, whereas the antitrust laws give the United States special status as champion of the public interest. Compare 15 U.S.C. 4, 25 (duty of government to institute proceedings to restrain antitrust violations) with 15 U.S.C. 15 (damage suits by persons injured in their business or property by antitrust violations), 26 (injunctive relief for persons threatened with loss or damage from antitrust violations). Moreover, a court's review of the Attorney General's exercise of discretion in reaching a settlement in such a case is necessarily deferential, in part to avoid constitutional questions that might otherwise arise. *Massachusetts School of Law at Andover, Inc.* v. *United States*, 118 F.3d 776, 783 (D.C. Cir. 1997). And unlike absent shareholders in derivative actions, those who are not formal parties to a government antitrust decree are not bound by it. See *id.* at 781; *United States v. LTV Corp.*, 746 F.2d 51, 53-54 & nn.5 & 6 (D.C. Cir. 1984) (per curiam) (concept of "privy to the record" includes absent shareholders in a derivative action who are bound by judgment; distinguishing non-parties in Tunney Act proceedings). Finally, non-parties who participate in Tunney Act proceedings without intervening do so pursuant to specific statutory authorization providing for such participation. See 15 U.S.C. 16(f)(3). Intervention would be required as a prerequsite to a Tunney Act appeal. See, *e.g.*, *LTV Corp.*, 746 F.2d at 54 ("those who object to the entry of a consent judgment must seek to intervene in the proceedings * * * as a condition of taking an appeal").

Like the antitrust enforcement settlement process, many environmental suits involving the government represent the public interest at large (as opposed to a corporation's financial interest), and thus courts afford deference to settlements reached between the government and a private party. Such cases routinely provide notice and an opportunity for public comment to the government before entry of a settlement by a court,

that does not have a binding effect on its actions or otherwise is not a final order. See, *e.g.*, *Webster Coal & Coke Co.* v. *Cassatt*, 207 U.S. 181, 187 (1907) (noting that "[t]here was here no attachment for contempt, no judgment on default, and no independent and collateral proceeding, the order disposing of which could be considered as a final decree").

B. Upholding The Rights Of Objecting Shareholders To Appeal District Court Decisions Approving Settlements Furthers The Purposes Underlying Rule 23.1

Rule 23.1 protects absent shareholders from settlements that unfairly compromise their interests by providing them with notice of and an opportunity to object to settlements and by requiring court approval of settlements. Affording objecting shareholders the narrow right to appeal the overruling of their objections furthers that important purpose.

1. Prior to the adoption of Rule 23 in 1938 (in which the notice and court-approval requirements were first provided),

but would not afford persons who comment quasi party status. See, *e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9622(d)(2); Solid Waste Disposal Act (SWDA), 42 U.S.C. 6973(d); see also 28 C.F.R. 50.7 (Department of Justice policy providing for public notice and comment on settlements of environmental claims seeking to abate the discharge of pollutants). Those situations are quite different from the derivative suit settlement at issue here. In environmental settlements, members of the general public are given an opportunity to make their views known but are not the subjects of a show cause order or a directed notice and thus are not given a direct right to participate as litigants without first intervening to become a party; the general rule is that one must intervene in order to litigate (including appeal). Indeed, the federal statutes involved generally contain provisions concerning intervention. See CERCLA, 42 U.S.C. 9613(i); SWDA, 42 U.S.C. 6972(b)(1) & 6972(b)(2)(E); see also 28 C.F.R. 50.7 (DOJ policy reserves right to oppose intervention).

some courts allowed the named stockholder unilaterally to dismiss or compromise the derivative action without notifying the other stockholders and without approval of the court. See C. McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421, 430-432 (1937).[14] Equity Rule 27 then in effect did not require notice to stockholders or court approval in the event of a dismissal or compromise. McLaughlin recommended that to protect the absent stockholders, the court should be required to approve the settlement. *Id.* at 433-35.

The 1938 drafters of Rule 23 agreed with McLaughlin, citing his article in support of the new requirement of notice to absent shareholders and court approval of any proposed dismissal or compromise of a stockholder derivative action. See Rule 23 Advisory Committee Notes, note to subdivision (c) (1937). As Professor Moore stated in explaining the purpose of Rule 23(c), "notice will tend to lessen strike suits by shareholders, since a shareholder and his counsel will not be able to sue and settle in the dark; and it will prevent unrighteous compromise of a just shareholders' action." J. Moore & M. Cohn, *Federal Class Actions–Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 555, 556 (1938). The 1966 amendments to Rule 23, which separated out derivative actions for treatment in a new Rule 23.1, did not make any change to the notice and approval process in shareholder derivative actions.

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[14] As McLaughlin explained, "[t]o allow a single stockholder or group of stockholders the power to make a private compromise of the corporate cause of action places a heavy reliance upon their judgment," which raises the problem that the corporation's claim is "at the mercy of individuals who have no hope of personal recovery even if the suit is prosecuted successfully, and who stand to suffer considerable losses in costs if unsuccessful; obviously a wide door is opened to strike suits and collusive payments to stockholders which may rarely, if ever, be recovered by the corporation." 46 Yale L.J. at 430.

Rule 23.1 thus embodies the historical recognition that, although plaintiffs and their counsel ordinarily strive to act conscientiously in the best interests of the shareholders, self-designated shareholder plaintiffs and their counsel do not invariably further those interests. A derivative plaintiff may misapprehend the strength of the case or the value of the settlement; plaintiffs' counsel may lack the strength of will to see a case to conclusion; and in rare instances a settlement may even involve faithlessness, dishonesty, or collusion among the parties. "There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent." *Saylor* v. *Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972) (Friendly, J.). See also *Bell Atlantic Corp.*, 2 F.3d at 1309 ("Courts and commentators have long recognized the 'agency costs' inherent in class and derivative actions where the client, as principal, is neither well-situated nor adequately motivated to closely monitor and control the attorney, his agent.") (footnotes omitted).

2. Notice directed to shareholders informs them of a proposed settlement so that they may assess its adequacy and affords them an opportunity to object to a settlement that does not protect their interest.[15] The requirement of

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[15] The notice informs shareholders of the substantive terms of the proposed settlement and orders them to show cause why the settlement should not be approved as fair, reasonable and adequate to the corporation. The notice specifies that shareholders may object (usually in writing), informs them of the time and place for a hearing on whether the settlement should be approved, and warns the shareholders that approval of the settlement will bar all future claims. See, *e.g.*, *Maher* v. *Zapata Corp.*, 714 F.2d 436, 450-453 (5th Cir. 1983); *White* v. *Auerbach*, 500 F.2d 822, 823 (2d Cir. 1974); *Greenspun v. Bogan*, 492 F.2d 375, 378 (1st Cir. 1974); *Bernstein* v. *Mediobanca Banca di Credito Finanzario-Societa Per Azioni*, 78 F.R.D. 1, 3 (S.D.N.Y. 1978); *Boggess* v. *Hogan*, 410 F. Supp. 433, 442-443 (N.D. Ill. 1975); *In re National Student Marketing Litig.*, 68 F.R.D. 151, 152 (D.D.C. 1974); *Glicken* v. *Bradford*, 35 F.R.D. 144, 148 (S.D.N.Y. 1964). See also *Manual for Complex Litigation 3d* §§ 30.41,

court approval of any settlement is intended to protect further the interests of absent shareholders. "It is well established that a court should not merely rubber stamp whatever settlement is proposed by the parties to a shareholder derivative action. A court must, instead, exercise judgment sufficiently independent and objective to safeguard the interests of shareholders not directly involved in the action." *Greenspun* v. *Bogan*, 492 F.2d 375, 378 (1st Cir. 1974). Cf. *In re Jiffy Lube Securities Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) ("The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations."). The court may not approve a settlement without finding it to be "fair, reasonable and adequate." *Jones* v. *Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984); see also *Granada Investments, Inc.* v. *DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992).[16]

The objecting shareholders play a pivotal role in the settlement approval process, since they alone have the incentive to attempt to stop a process that builds momentum from the moment a deal is struck between the derivative

33.36 ("Objections may be raised not only by class members but also by parties seeking to intervene under Fed. R. Civ. P. 24."). The order in this case conformed to those general types, providing that "[a]ny shareholder of record of ADM as of May 29, 1997, may appear and show cause * * * why the proposed settlement of the derivative claims embodied in the Stipulation should or should not be approved as fair, reasonable and adequate." Order, No. 95-CV-2279 (C.D. Ill. May 30, 1997).

[16] The Seventh Circuit's statement that the only purpose of notice under Rule 23.1 is so "that other investors may contest the faithfulness or honesty of the self-appointed plaintiff" is belied by the established focus of a district court's inquiry in determining whether the substantive terms of settlement are fair to shareholders and the corporation. The proper scope of the inquiry at the settlement hearing also is demonstrated by what is set forth in the notice under Rule 23.1, which does not restrict objectors to contesting the good faith of the representative. See *supra* note 15.

plaintiff and the defendant.[17] Once the derivative plaintiff and the defendant have come to terms, they are advocates for their settlement, a development that deprives the court of the benefit of an adversarial presentation on the question Rule 23.1 directs the court to decide: whether the settlement is in the best interests of all shareholders, named and absent alike. When the once-adversaries, now prospective settling parties, present an agreement to the court, "[a]ll the dynamics conduce to judicial approval of such settlements." *Alleghany Corp.* v. *Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), aff'd en banc by equally divided court, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). Objecting shareholders, therefore, serve a critical function because they alone have the incentive to inform the court that a proposed settlement is deficient, disadvantageous, or unfair to all shareholders.[18]

3. The opportunity to challenge settlements of those private disputes in the district court without the corresponding right to appeal is not sufficient when there is a natural tendency among trial courts to favor approving settlements to which the named parties have agreed. In that sense, "[j]udicial approval of the settlement is an imperfect safeguard." J. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, Law & Contemp. Probs., Summer 1985, 5, 31.

[17] By contrast, such concerns are significantly less pronounced under statutory regimes that provide for settlement of actions brought by the government to enforce various laws because of the broader public interest the government is entrusted to protect. See *supra* note 13.

[18] See *Bell Atlantic Corp.*, 2 F.3d at 1310 (objectors give court access to information on the settlement's merits); *Papilsky* v. *Berndt*, 466 F.2d 251, 258 (2d Cir. 1972) (notice is essential to ensure resolution in best interest of corporation and absent shareholders); *Cohen*, 127 F.2d at 724-725 (court benefits from broader view of the settlement provided by objectors).

An unfettered, though narrowly tailored, right to appeal the district court's decision to approve the settlement will further the purposes underlying Rule 23.1 by ensuring the opportunity for appellate scrutiny of what otherwise would be largely unreviewable proceedings. In that sense, normal intervention may not be a viable alternative for the shareholder whose objections are overruled. The district court may be too readily disposed to find that an objecting shareholder was adequately represented within the meaning of Federal Rule of Civil Procedure 24, and thus deny intervention, if it also concludes that the settlement was fair, reasonable and adequate within the meaning of Rule 23.1. Moreover, the standards for objecting under Rule 23.1 are different from intervention under Rule 24, and it was precisely that point that the *Cohen* court recognized in ruling that an objecting shareholder had a limited right to appeal without demonstrating that the standards for intervention had been satisfied. See 127 F.2d at 724-725; see also *Bell Atlantic Corp.*, 2 F.3d at 1310 (cautioning against the erection of "obstacles to challenging derivative action settlement agreements").

C. The Court Of Appeals' Contrary Reasoning Is Unpersuasive

The court of appeals concluded that if the objecting shareholders wished to appeal, they must first intervene as parties. As a practical matter, that conclusion imposes an unnecessary requirement. By appealing the district court's approval of the settlement, the objecting shareholders are merely seeking to persuade the court of appeals that the district court erred in rejecting the arguments they were required to make if they hoped to avert the imposition of a binding judgment adverse to their interests. Requiring intervention as a party for the purpose of making an appearance in the court of appeals threatens to interpose an unwarranted obstacle to what historically has been an

essentially automatic right that comparably situated quasi parties have had to pursue their appeals.[19]

As a matter of law and precedent, the court of appeals' reliance on this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988), is misplaced. In *Marino*, a class action had been brought by groups representing minority police officers who challenged promotion practices by the New York City Police Department. The lawsuit was settled by consent decree. The decree was appealed, not by minority officers who were members of the class, but by a group of white officers, who had objected to the decree in district court but had not sought to intervene as parties in the case. This Court held that they could not appeal the consent decree without intervening. Observing that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment," the Court explained that "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they

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[19] We are particularly concerned about the Seventh Circuit's suggestion that absent shareholders must demonstrate that the named representative has been dishonest or unfaithful in order to intervene for purposes of appeal. If that view were correct, even if the shareholders were interested only in objecting to the fairness of a settlement, they nonetheless would have to meet the heavier burden of proving bad faith by the class representative before being permitted to appeal. The fairness of a settlement does not turn simply on the good faith of the representative. Other courts, moreover, have held that a represented party must intervene prior to the settlement process. See *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988) (describing motion to intervene after entry of consent decree as "untimely"); *Guthrie* v. *Evans*, 815 F.2d 626, 628 (11th Cir. 1987) (class member may intervene as a matter of right "in the course of the class action" to monitor representation of his rights). We disagree with such a requirement because judicial administration is ill-served by requiring absent class members or shareholders to submit formal intervention motions simply to preserve their right to appeal a settlement that has yet to be proposed or accepted. See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 560-561 (1974).

may not appeal from the consent decree approving that lawsuit's settlement." *Marino*, 484 U.S. at 304.

Marino is distinguishable from this case. Although the interests of the white police officers were affected in some sense by the consent decree in *Marino*, the action did not involve any legal claim on their behalf; they were otherwise strangers to the lawsuit; and they were not precluded by the judgment from subsequently litigating any claims they might have. See *Martin* v. *Wilks*, 490 U.S. 755, 763 (1989). Thus, the non-party police officers in *Marino* were quite different from the quasi-party objecting shareholders in this case.[20] Here, the shareholders' personal interests in their corporation's claim have been asserted on the shareholders' behalf by the named plaintiff; the appealing shareholders have appeared in district court in response to a show cause notice to litigate the propriety of the settlement; and the appealing shareholders will be foreclosed by the judgment from pursuing those claims henceforth.[21]

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[20] Congress, of course, can limit challenges to a consent decree by individuals whose claims were not asserted in the original action but whose rights, nevertheless, are affected by the decree. For example, after *Martin* v. *Wilks*, in 1991 Congress amended Title VII, 42 U.S.C. 2000e et seq., to provide that any person who is given actual notice of a proposed decree and who might be affected by it must state his or her objections to the court reviewing the settlement at that time and may not file a later challenge to the decree. See 42 U.S.C. 2000e-2(n). Thus, in a situation like that presented in *Marino*, white officers with notice of a decree that might affect their rights would have to appear in that court to file their objections. Section 2000e-2(n) does not purport to change the rule in *Marino* that such a person must intervene in order to appeal. The preclusive effect of the judgment, however, may give substantial support to a motion to intervene.

[21] In neither *Marino* itself nor the sole decision cited on the issue, *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397 (1917), did the Court call into question the many prior cases in which it had upheld the rights of quasi parties to appeal. Rather, the Court simply invoked the long-standing general rule that only a party or a privy to the record may

The court of appeals also based its holding on Federal Rule of Appellate Procedure 3(c), which provides: "A notice of appeal must specify the *party or parties* taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." See Pet. App. 2a (emphasis added by Seventh Circuit decision). That rule, however, addresses the contents of the notice and does not limit the "parties" on appeal to only those persons who were formally made "parties" in the district court proceedings. The court of appeals appears to have read "party or parties" to mean only those listed in the district court's caption. Such a reading conflicts with well-settled case law allowing appellants who were not parties below to be listed in the notice of appeal and to prosecute their appeal. See, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) (permitting non-party to appeal denial of a motion for leave to intervene); *Collier* v. *Marshall, Dennehey, Warner, Coleman & Goggin*, 977 F.2d 93, 94-95 (3d Cir. 1992) (attorney appealing order in which he is sanctioned must be listed in notice of appeal); *Mylett* v. *Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989) (per curiam) (same); *FTC* V. *Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) (same); *DeLuca* v. *Long Island Lighting Co.*, 862 F.2d 427, 429-430 (2d Cir. 1988) (same). See also *Miltier* v. *Downes*, 935 F.2d 660, 662-663 & n.1 (4th Cir. 1991) (same); *Aetna Life Ins. Co.* v. *Alla Medical Servs.*, 855 F.2d 1470, 1473 (9th Cir. 1988) (allowing counsel to appeal sanction order even though not a party below and not explicitly listed as a party to the appeal). See generally 15A C. Wright *et al.*, *Federal Practice and Procedure Jurisdiction* § 3902.1 (2d ed. 1992). Plainly, then, "the party or parties taking the appeal" cannot be limited to the named parties below. The far more natural reading of Federal Rule of Appellate Procedure 3(c)—consistent with its notice-serving function—is that a

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appeal. See *Marino*, 484 U.S. at 587; *Jack*, 244 U.S. at 402 (quoting *Bayard* v. *Lombard*, 50 U.S (9 How.) 530, 551 (1850)).

"notice of appeal must specify [who is] taking the appeal." And that reading offers no support for the Seventh Circuit's position.[22]

Finally, the court of appeals also based its decision on the conclusion that allowing shareholder objectors to appeal the settlement without intervention would "fragment the control" of the action. Pet. App. 4a. That reasoning disregards Rule 23.1's recognition that other shareholders are entitled to participate in the district court to object to a settlement proposed by the named-plaintiff shareholder. The Federal Rules plainly do not evince a concern that that limited degree of participation by persons other than the named plaintiff will unduly disrupt the litigation or render it unmanageable. In any event, an appeal by a quasi-party objecting shareholder would not raise those issues, since the appeal would be confined to the discrete legal issue whether the district court abused its discretion in approving the settlement. See *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995); *Bell Atlantic Corp.*, 2 F.3d at 1305-1306.[23]

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[22] On December 1, 1998, the new Federal Rules of Appellate Procedure will take effect. The new Rule 3(c) is similar to the old rule in that it does not specify that a "party" must be a named party in the district court. New Rule 3(c)(3), however, does contain a new provision for class actions, providing that "the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class."

[23] If, contrary to our submission, the Court were to conclude that the historical practice concerning quasi parties and the explicit confirmation of individual shareholder interests in Rule 23.1 are insufficient, absent intervention, to allow an objecting shareholder to take an appeal of a district court judgment approving a settlement, the Court should make clear that Rule 24 should be interpreted and applied in this special setting in a way that ensures that intervention will be routinely granted so as to effectuate fully the purposes of Rule 23.1 (and the quasi party cases) of facilitating objections in the district court in matters directly affecting shareholders' interests and appeal of district court judgments that reject those objections. See *Bryant* v. *Yellin*, 447 U.S. 352, 366 (1980) (concluding that intervention after judgment by affected residents was permissible for the purpose of taking appeal where government suing on behalf of public interest decided to forgo appeal). In the alternative, the Federal Rules of Civil and Appellate Procedure could be amended to address the problem.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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